

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 September 2003

BALCA Case No.: 2003-INA-24
ETA Case No.: P2000-NY-02483739

In the Matter of:

RISA HERMAN,
Employer,

on behalf of

LIDIA MELENDEZ,
Alien.

Appearance: Donald L. Schlemmer, Esquire
For Alien and Employer

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "HouseholdCook."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 30, 2001, Employer, Risa Herman (“Employer”) filed an application for labor certification on behalf of the Alien, Lidia Melendez (“Alien”) to fill the position of "Live Out Cook." (AF 11). The work hours were 8:00 a.m. to 4:00 p.m., and the job required two years of experience in the job offered or a related occupation.

The CO issued a Notice of Findings ("NOF") on July 19, 2002, proposing to deny certification for failure to establish that the job opportunity was clearly open to any qualified U.S. worker as required by 20 C.F.R. §656.20(c)(8), and for lack of sufficient funds to guarantee the Alien's salary as required by 20 C.F.R. § 656.20(c)(1). (AF 38). Employer was advised that the application contained insufficient information to determine if the position of domestic cook actually existed in the household or whether the job was being created solely for the purpose of qualifying the Alien as a skilled worker under current immigration law. Employer was directed to provide rebuttal evidence which documented that the position of domestic cook was a *bona fide* job opportunity. Rebuttal, at a minimum, needed to include responses to eight questions. In addition, the CO observed that Employer had submitted a joint Federal Income Tax Return for 2001 in support of its application, and that this tax return indicated to the CO that Employer did not have sufficient resources to afford to pay a full time domestic cook's salary. Specifically, the tax return indicated that Employer would have to devote over 1/3 of the adjusted gross income to pay the cook's salary (noting that the family had seven members), and that the cook's salary actually exceeded the taxable income as shown on the tax return. Employer was directed to clarify and document its ability to guarantee the salary with any other other monies not shown or declared in the Federal Income Tax Return.

Counsel for Employer submitted a rebuttal dated August 23, 2002, attached to which was a letter from Employer. (AF 36-38). The letter included a daily schedule for Employer’s household, an explanation of the household's entertainment schedule, and an explanation of the 2001 tax returns. Employer’s schedule on a weekly basis indicated that the cook prepares three meals daily, six days

a week, which involves of special preparations to follow Jewish customs and laws, including buying certified foods and preparing them in accordance with kosher dietary laws. Employer additionally asserted that the family entertained frequently, two times per week, amounting to approximately 95 times during a 12-month period. In addition to regular weekly meals, it was asserted that the cook spent a total of four hours for approximately 30 times a year preparing Jewish holiday meals. Employer argued that the CO was mistaken about the family's ability to afford a domestic cook. Employer noted that the taxable income shown on the return reflected a number of non-cash deductions, including seven individual or dependent exemptions, a depreciation expense, and a long-term capital loss on stock. Thus, once the non-cash deductions were taken into account, Employer had nearly twice as much cash available as compared to the taxable income shown on the tax return to pay the Alien's salary. Employer also argued that the availability of the Alien would enable her to build her practice as a speech therapist, resulting in significantly higher income opportunities, since she could make nearly seven times as much an hour as the hourly wage of the Alien.

The CO issued a Final Determination ("FD") on September 12, 2002, denying certification. (AF 39- 40). The CO found that Employer failed to rebut the finding rendered pursuant to 20 C.F.R. §656.20(c)(1) and §656.20(c)(8), inasmuch as Employer failed to establish that adequate funds were available to pay the wage or salary offered and that the position was a *bona fide* one, clearly open to any qualified U.S. worker. Specifically, the CO found that Employer failed to successfully address all questions raised in the NOF. Employer's rebuttal discussed the length of time to prepare most meals; however, the CO observed that it did not discuss the length of time spent food shopping. Excluding the time spent food shopping, the CO still found that the food preparation time did not constitute a bona fide, full time 40 hour work week. The CO found that the income tax return still indicated that the family would be devoting 33% of their gross income to pay the cook, and that the cook's wages would exceed Employer's taxable income. The CO observed that an individual's disposable income is normally less than or equal to their taxable income. Thus, it did not appear to the CO that Employer could guarantee the wage offer being made to the domestic cook.

On October 25, 2002, the Board of Alien Labor Certification Appeals ("Board" or "BALCA")

received Employer's Request for Review. (AF94). Noting that Employer's request appeared to have been untimely and the Appeal File did not contain a copy of the envelope in which it was transmitted, the Board issued an Order to Show Cause why the Appeal should not be dismissed. Employer through Counsel responded by letter dated August 6, 2003. Employer asserts that rebuttal material was filed in a timely fashion, via first class mail, on October 17, 2002. Based on Employer's representation of a timely filing, we will proceed to the merits.

DISCUSSION

The issue of whether a job opportunity for a domestic cook is a *bona fide* offer of employment under section 656.20(c)(8) was discussed by the Board in *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). In that case, the Board adopted a "totality of the circumstances" test for consideration of whether an application was based on a mis-characterization of the position, the problem being the appearance that employers were using the domestic cook position to classify the job as a skilled position to avoid the long wait for a visa, when in reality the employer was seeking a housekeeper who also had cooking duties. As the Board pointed out in *Uy*:

when an employer presents a labor certification application for a "Domestic Cook," attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. The DOT contemplates that a domestic cook is a skilled, professional cook, and would be able to cook sophisticated meals, as illustrated by the much higher experience requirement.... If a labor certification application mis-characterizes the position offered, the job is not clearly open to U.S. workers in violation of section 656.20(c)(8), because the test of the labor market will be for higher-skilled domestic cooks rather than lower-skilled domestic positions that include cooking duties.

The requirement of a *bona fide* job opportunity arises out of 20 C.F.R. §656.20(c)(8), which

requires that an employer attest that the “job opportunity has been and is clearly open to any qualified U.S. worker.” *Pasadena Typewriter and Adding Machine Co. Inc. and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AABT (C.D. Cal. 1987). We find that the totality of the circumstances of Employer's household do not establish that there is a *bona fide* job opportunity for a domestic cook.

Moreover, an application for labor certification must clearly show that the employer has enough funds available to pay the wage or salary offered to the alien. 20 C.F.R. § 656.20(c)(1). We find that Employer failed to clearly establish sufficiency of funds.

Turning first to the question of financial ability to guarantee the Alien's salary, we recognize that a tax return may not reveal the whole picture regarding a family's financial circumstances. However, where a CO requests documentation of ability to pay, and the tax return indicates on its face a lack of sufficient funds to pay the proposed salary, an employer should provide a documented explanation or documentation of sources of funds not revealed on the tax return. *See Uy, supra* ("Under the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued."). Here, Employer's rebuttal merely argued that the CO had not taken into adequate consideration the family's non-cash deductions and that freeing Employer from cooking responsibilities would enable her to devote more time to earning money. Employer did not allege the existence of financial resources not shown by the tax return. Employer's rebuttal is wholly lacking in credibility. This is a family of seven members which is proffering that it is willing to devote about 1/3 of its gross income to paying the salary of a domestic work whose only responsibility is cooking related duties. *See Carlos Uy, supra* ("Mr. Uy may have the ability to pay the cook's wages in an absolute sense; but it is highly questionable on the record before us that he would be willing to use approximately one-third of his gross income to pay for a cook. It is possible that Mr. Uy has sources of money that would not have been identified in his tax return, but there is no evidence of that on the record. It seems remarkable that the first priority of the Uy household is to hire a cook, yet retain the duties of grocery shopping, cleaning, laundry, etc., for

household members."). Employer's assertion that hiring the Alien to cook would free her to earn more money is too speculative to be given much probative weight. Thus, we affirm the CO's denial of labor certification under 20 C.F.R. § 656.20(c)(1) for failure to establish sufficiency of funds to guarantee the Alien's salary. We also find that the apparent limited financial resources of Employer's household is a factor that strongly suggests that this is not a bona fide application for a domestic cook under the totality of circumstances test stated in *Carlos Uy* pursuant to 20 C.F.R. § 656.20(c)(8).

Turning to the other circumstances of the household, in *Jane B. Horn*, 1994-INA-6 (Nov. 30, 1994), labor certification was denied where the CO questioned whether the position of Domestic Cook was full-time and Employer's rebuttal showed that the jobholder's typical 40 hour week would only include serving the two adult members of the household twenty-five meals, food shopping and minimal cooking for entertainment. In the instant case, Employer has shown that less than twenty meals per week would be prepared on a regular basis. While Employer claims that the family's religious observances have necessitated the addition of a domestic cook, it may be observed that the rebuttal did not detail the circumstances which led to the current job offer.

In sum, the totality of the circumstances herein does not establish that a *bona fide* position for a domestic cook is, in fact, available to U.S. workers herein, and the CO properly denied labor certification under 20 C.F.R. § 656.20(c)(8).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.